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Navieros Inter-Americanos v. MV Vasilias, 120 F.3d 304 (1st Cir. 1997) (Decided July 28, 1997)

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RULES C AND B

When there is a Rule C arrest with a time charter agreement, with performance such as paying hire, a maritime lien may exist against a charter before there is control over the cargo. Under Rule B attachment, if the respondent and agent for the charter are not present within the district, attachment may proceed.

Navieros Inter-Americanos v. MV Vasilis, 120 F.3d 304 (1st Cir. 1997)
(Decided July 28, 1997)

On March 28, 1996 plaintiff-appellee Navieros Inter-Americanos ("Navieros"), a Florida Corporation, entered into a fixed time charter with the defendant-appellants. Navieros, the charterer, believed the vessel, the M/V Vasilis Express, was owned by Royal United Shipping, Inc. ("Royal United"), and registered in the West Indies. However, it was owned by Vasilis, Inc., a corporation closely linked to Royal United.

Navieros chartered the vessel for two round trips between Florida and Guatemala, with an option for a third. The trips were to total approximately 28 days at \$2,300 per day. The charter party stated that the charter was to commence upon the vessel's arrival at the pilot station in Port Everglades, Florida where Navieros' cargo would be loaded.

On March 28, 1996, Kenneth Coleman ("Coleman"), President of Navieros, boarded the vessel while docked in Miami to discuss stowage plans. While aboard, Coleman also instructed the captain to berth his vessel in Port Everglades at Pier 19, rather than at the pilot station. However, prior to arrival at Pier 19 the vessel stopped for repairs at Bicentennial Park in Miami. During this period, Navieros ordered fuel for the vessel and confirmed the reservation in Port Everglades.

While the vessel was delayed, Royal United entered into a second time charter party with Comet Lines Agency, Inc. ("Comet"), which was unaware of the existing charter party with Navieros. The Comet charter party was to begin April 4, at \$2,630 per day for 30 days and was for the carriage of cargo between San Juan, Puerto Rico and Venezuela.

Upon arrival in San Juan on April 13, the United States Coast Guard detained the vessel for a litany of safety violations. Navieros heard of the vessel's detention and filed a complaint in the federal district court in Puerto Rico. The initial action was in rem against the vessel based on breach of a time charter agreement and to enforce a maritime lien.

On April 18, the court in an ex parte proceeding, ordered the arrest of the vessel pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims to the Federal Rules of Civil Procedure. Under Rule C, "the holder of a maritime lien can bring an in rem action against the vessel subject to the lien." The court stated Navieros made a prima facie showing of a maritime lien against the vessel. On April 24, Navieros amended its complaint, moving for attachment of the vessel under Supplemental Rule B. Rule B states, if the defendant "shall not be found within the district," the admiralty plaintiff can acquire quasi in rem jurisdiction over the defendant by attaching property in the district. In an affidavit submitted by Navieros, the defendant, Royal United, could not be found within the district. Soon after,

Navieros again amended the complaint to include Vasilia as an in personam defendant along with Royal United. The court then set a trial date of May 23.

Vasilia argued that the Rule C arrest was improper because there was no maritime lien. Vasilia stated the charter party agreement was still executory since the vessel had not yet been delivered to Navieros at the time of the breach. Vasilia also argued the Rule B attachment was invalid because Vasilia appointed an agent who could be found within the district for service of process on its behalf.

On May 29, the U.S. District Court concluded that the Rule C and Rule B attachments were valid. The court stated that the vessel was delivered to the charterer when the ship's captain accepted Coleman's instructions to proceed to Pier 19 at Port Everglades for loading. Therefore, under Rule C, Navieros had a valid maritime lien against the vessel. The U.S. District Court also upheld Rule B because Vasilia, a Liberian corporation, had no corporate presence in the district and its eleventh hour appointment of an agent was only a strategic appointment to elude attachment.

The U.S. District Court entered a judgment against the vessel and the two in personam defendants. The vessel was to be sold at auction by the United States Marshal. The total judgment against Vasilia amounted to \$593,470.30. Vasilia appealed, contesting the validity of the arrest under Rule C and the attachment under Rule B.

To have an in rem proceeding under Rule C, a plaintiff must have a maritime lien against the defendant's vessel. *See Bunn v. Global Marine, Inc.*, 428 F.2d 40, 48 n. 10 (5th Cir. 1970). However, the executory contract doctrine specifies that charterers have no maritime lien until performance under the contract begins. *Krauss Bros. Lumber Co. v. Dimon S.S. Corp. (The Pacific Cedar)*, 290 U.S. 117, 121, 54, S.Ct. 105, 106, 78 L.Ed. 216 (1933).

The district court relied on *E.A.S.T. Inc. v. M/V Alaia*, 673 F. Supp. 796, 802 (E.D. La 1987), *aff'd*, 876 F.2d 1168 (5th Cir.1989), wherein it was stated that with time charters, as opposed to voyage charters, a maritime lien may exist before there is control of the cargo on the vessel. This is so because under a time charter the ship owner puts his vessel, master, and crew to service for a named period. The charterer must begin his performance, "well before cargo is, if ever, loaded on the vessel by paying hire, appointing and funding a port agent and arranging and paying for pilotage, tug, assistance and line handlers and all else necessary to berth the vessel in order to load cargo." *Id.* at 803.

The U.S. Court of Appeals held that the district court had not erred in its decision because performance of the charter clearly began when the ship's captain accepted Coleman's instructions in Miami. At that moment the charter could no longer be considered executory. Thus, the Court of Appeals ruled that both the maritime lien against the vessel and the Rule C arrest were proper and affirmed the district's court ruling.

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